



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for March 3, 2023

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BOARD DECISIONS

Appellant: Kenneth J. Johnson
Agency: Department of Veterans Affairs
Decision Number: [2023 MSPB 9](#)
Docket Numbers: CH-0752-17-0442-I-1

INTERIM RELIEF

The appellant filed a Board appeal challenging his removal. After holding a hearing, the administrative judge issued an initial decision finding that the agency proved only one of its two charges and mitigating the penalty to a 30-day suspension. The administrative judge ordered the agency to provide the appellant with interim relief if either party filed a petition for review. The agency filed a petition for review of the initial decision. The appellant did not respond to the agency's petition, but he filed a petition for enforcement of the interim relief order. In response, the agency submitted evidence showing that it had cancelled the appellant's removal and placed him on leave without pay because it had determined that the appellant was unable to work.

Holding: The appellant's ability to work has no impact on the agency's statutory obligation to provide pay during the interim relief period.

1. The agency failed to comply with the administrative judge's interim

relief order by cancelling the appellant's removal and placing him on leave without pay.

2. The resumption of pay during the interim relief period is the most fundamental element of interim relief and any undue disruption determination does not relieve the agency of its obligation to pay the appellant and provide him benefits during the interim relief period. Thus, the Board did not address whether the agency's actions constituted a valid undue disruption determination.
3. The Board dismissed the agency's petition for review for failure to comply with the interim relief order.

Appellant: Rosemary Jenkins

Agency: United States Postal Service

Decision Number: [2023 MSPB 8](#)

Docket Numbers: DC-0752-11-0867-B-1

RESTORATION TO DUTY

ENFORCED LEAVE

CONSTRUCTIVE SUSPENSION

The appellant was employed as a City Carrier in Norfolk, VA. On September 13, 2004, she sustained a compensable work-related injury to her right foot. In June 2005, she underwent surgery and thereafter returned to work with medical restrictions. On September 10, 2009, the appellant again injured her right foot and entered a leave status. She filed a claim with the Office of Workers' Compensation Programs (OWCP) for recurrence of her 2004 injury, but OWCP denied her claim. On April 30, 2011, the appellant attempted to report to work but was informed that there was no work available within her medical restrictions. On June 21, 2011, the appellant provided the agency with a CA-17 Duty Status Report indicating that she was released to return to work with medical restrictions that limited her to performing sedentary work. The agency conducted a search for light-duty work in Norfolk, VA, but found no available work within the appellant's medical restrictions. Consequently, on July 8, 2011, the agency issued the appellant a notice of proposed placement on enforced leave. On August 3, 2011, the deciding official issued a decision affirming the appellant's placement on enforced leave.

The appellant filed a Board appeal alleging that the agency constructively suspended her. While her appeal was pending, on September 19, 2011, OWCP issued a reconsideration decision vacating its prior decision

and finding, based on newly submitted medical evidence, that the appellant's September 10, 2009 injury was compensable as a recurrence of her 2004 injury. After holding a hearing, the administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction finding that the appellant failed to establish that she was constructively suspended. On petition for review, the Board found jurisdiction over the appellant's placement in an enforced leave status pursuant to recently issued precedent, *Abbott v. U.S. Postal Service*, 121 M.S.P.R. 294 (2014), in which the Board held that placement on enforced leave for more than 14 days constitutes an adverse action within the Board's jurisdiction and should not be adjudicated as a constructive suspension. Therefore, the Board remanded the appeal for further adjudication on the merits and directed the administrative judge to consider the possible effect of OWCP's reconsideration decision.

On remand, the administrative judge issued a remand initial decision sustaining the agency's enforced leave action. Regarding OWCP's reconsideration decision, the administrative judge found that the appellant might be able to establish jurisdiction over a claim that she was denied restoration as a partially recovered employee under 5 C.F.R. § 353.301 and advised the appellant that she could file a separate restoration appeal. The appellant filed a petition for review asserting that the administrative judge erred in failing to adjudicate her claim that the agency denied her restoration rights.

Holding: When an agency fails to assign work to a partially recovered employee and requires her absence from duty, the employee may not contest the agency's action as a suspension because her rights and remedies are subsumed in the restoration process.

1. Upon the appellant's partial recovery from her September 10, 2009 injury, she acquired restoration rights under 5 C.F.R. § 353.301(d). From that date forward, her rights and remedies concerning her attempted return to duty were subsumed under the restoration process, notwithstanding the fact that the agency's denial of restoration was couched as an enforced leave action.
2. After September 10, 2009, if the agency arbitrarily and capriciously denied the appellant restoration as a partially recovered employee, her exclusive remedy is an appeal under 5 C.F.R. § 353.304(c).
3. Because the appellant was in enforced leave status following September 10, 2009, the Board dismissed her chapter 75 appeal.

4. The Board forwarded the matter for adjudication as a new restoration appeal under 5 C.F.R. § 353.304(c).

COURT DECISIONS

NONPRECEDENTIAL:

Asprec Novilla v. Department of Agriculture, [No. 2023-1118](#) (Fed. Cir. Mar. 2, 2023) (CH-0752-19-0220-I-2) (dismissing the petition as untimely filed).

Elhelbawy v. Department of Commerce, [No. 2023-1431](#) (Fed. Cir. Feb. 28, 2023) (DE-0752-13-0130-I-2) (dismissing for failure to prosecute).

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